Supreme Court, U.S.
FILED

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In The

SUPREME COURT OF THE UNITED STATES

JAMES SYSLO

Petitioner,

against

CHERYL SYSLO

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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## QUESTIONS PRESENTED FOR REVIEW

1. Is it a denial of an individual's due process rights and other constitutional rights in a divorce case when a state court in rendering a division of property fails to ensure that any division of property is equitable and in the process place a party in a significant negative net worth position and/or grant judgment (not relative to spousal support) for which there are no significant assets or potential income to satisfy same.

2. Is it a denial of an individual's due process rights or other constitutional rights for a trial court in a divorce to find financial misconduct without finding a proof of said alleged financial conduct by clear and convincing evidence that involved marital assets and actions that occurred some four years before the final hearing (and before the divorce under consideration was filed) and without determining a fairly precise amount of assets allegedly divided.

3. It is a denial of an individual's due process and other constitutional rights under the fifth and sixth amendment of the United

States Constitution to award spousal support without a determination of the present income or income capacity of the party against whom the award is ordered.

4. It is a denial of an individual's due process in finding a party to a divorce guilty of financial misconduct without clear and convincing evidence of the elements comprising financial misconduct, since financial misconduct in the divorce context is tantamount to fraud. (See *Rivera v. Minnich*, 107 S. Ct. 3001, 97 L.Ed. id 473, 483 U.S. 574. - particularly dissent)

## LIST OF PARTIES

1. All parties to this matter are listed on cover sheet (no additional parties are involved)

## CORPORATE DISCLOSURE STATEMENT

1. Not applicable in this case.

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### CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINION AND ORDERS ENTERED IN THE CASE

*Syslo v. Syslo* (September 30, 2002), Lucas App. No. L-01-1273, unreported, 2002 WL 31166937, cert. den. *Syslo v. Syslo* (2003), 784 N.E.2d 711 (Table), 98 Ohio St. 3d 1477.

In The
SUPREME COURT OF THE UNITED STATES

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JAMES SYSLO
Petitioner,
vs.
CHERYL SYSLO
Respondent.

---

**On Petition For a Writ Of Certiorari To The Ohio Supreme Court (U.S. Supreme Court)**

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**PRAYER AND JURIDICTIONAL BASIS FOR RELIEF**

Petitioner prays that the Writ of Certiorari be granted herein for the reasons stated below. Jurisdiction of this matter is advanced pursuant to 28 U.S.C. 1257.

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**STATEMENT OF CONSTITUTIONAL PROVISIONS**

Fifth and Sixth Amendments to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

Respondent (Appellee) and Petitioner were married June, 1989 with a minor son born of the marriage, (Grant Charles Syslo). The parties separated in 1996, while living in North Carolina. Throughout the marriage Appellant was working as an engineer (basically as an independent consultant) for various businesses, much of the which work required Petitioner to work away from home for extensive time periods. Respondent worked minimally on a sporadic basis to help supplement income, (as more fully discussed below).

Petitioner, as stated, was a consultant (engineer) which required him to move about frequently, most substantially a resultant effect of being employed for limited periods by a company (usually at a nuclear power facility) as a contract consultant. As a consequence, Petitioner had to move his wife (Respondent) and minor child frequently during the course of the marriage to be close to his employment opportunities. Even with the numerous job changes that Petitioner had to endure (as a limited time consultant), he maintained fewer homesteads than the

number of job changes-all in order to keep some semblance of stability for the family.

The record reflected that Petitioner earned on the average of $68,000 annually or more (in some years prior to the divorce hearing), with no additional substantial income for Petitioner. Near the time of the divorce, Respondent inherited or received the sum of $149,000 (plus a house) and another $22,000.00 from her mother. From this amount, Respondent was able to derive some interest income and to have access to funds for subsistence, etc. for her and the minor child - to supplement the support provided by Petitioner. In the last year or so prior to the final hearing on the divorce, Petitioner was not employed because of nuclear regulatory security concerns, namely involving excessive income garnishments emanating from support garnishments from Respondent in this case (and a previous case) and family problems.

Most of the property of the marriage was comprised of personal property mainly in the form of furniture and appliances. There were no substantial bank accounts (except those in which Respondent deposited an inheritance), no real estate, no pensions, 401 K's or other

retirement or savings benefits. Moreover, there were no stocks or bonds and each party had vehicles (Petitioner's main vehicle was a1988 Bronco).

As to the tangible personal property, there was an allegation that in 1996 (prior to the divorce herein) Petitioner had sold furniture, appliances and personal property of the parties (from the North Carolina residence) that Respondent maintained to be valued at $74,538.00, without accurately reflecting at trial how such value was derived. The Court noted in its judgment that it believed the $74,538.00 figure to be high, but still held Petitioner guilty of financial misconduct (fraudulent conduct) and granted Respondent a judgment (on the premise of financial misconduct, which Petitioner alleges was not based on clear and convincing evidence) for $75,000.00 and in essence not considering the presumption that one half of the amount of the alleged $74,538.00 in property purportedly involved in such "financial misconduct" would be considered property of Petitioner).

In the final analysis, the Trial Court made the following awards as to custody, visitation, child support, spousal support, property allocation, and other matters:

1) Plaintiff (Respondent) was granted custody of the minor child;

2) Defendant (Petitioner) was granted only supervised visitation with companionship rights with the minor child;

3) Plaintiff was granted a lump sum judgment against Defendant for $75,000.00 for financial misconduct; (to be paid within 30 days of the order).

4) Plaintiff was granted a lump sum judgment against Defendant for $17,120.00 for unpaid child support and spousal support;

5) Plaintiff was awarded a lump sum judgment against Defendant for medical bills in the amount of $1,208.81;

6) Plaintiff was granted the right to take the income tax exemption for the minor child.

7) Defendant was required to pay all debts of the marriage;( (totaling approximately $38,000.00 (Defendant's listed bills of $24,000.00 plus +$14,700-the Plaintiff's bills approximately)(although the Court reflected only the amount of $14, 710.00 in marital debt;) (The bills are separation totaled $73,000.00)

8) Plaintiff received spousal support in the amount of $1,000.00 per month for five years (with Court holding that Defendant's annual income to be$110,000.00;)

9) Plaintiff received an order for child support in the amount of $938.00 per month;

10) Plaintiff was awarded a judgment for attorneys fees in the amount of $7,000.00.

11) Defendant was awarded no property of any significant amount (since the only significant property Defendant had was a 1998 Bronco). The Court awarded to each party all personal property and vehicles in their possession (with no valuation or determination of what property is involved in this respect).

12) Plaintiff was awarded all her cash, real estate and personally inherited from her mother' estate.

In this case subsequent to the entry of the judgment incorporating the above provisions, Appellant filed an appeal with the Lucas County Court of Appeals. The Lucas County Court of Appeals affirmed as to all assignments of error except as to the question as to the award of child support.( See Appendix) This latter aspect was remanded to the Lucas County Trial Court for further determination (which remand is still pending in the Lucas County Court of Common Pleas). Subsequently an appeal was filed with the Ohio supreme Court and on March 12, 2003 the Ohio Supreme Court denied jurisdiction (without hearing or determination on the merits. This petition for writ of certiorari is based on the order of the Ohio Supreme Court dated March 12, 2003.

## REASONS FOR GRANTING THE WRIT

1. IS IT A DENIAL OF AN INDIVIDUAL'S DUE PROCESS RIGHTS AND OTHER CONSTITUTIONAL RIGHTS IN A DIVORCE CASE ENTERED WHEN A STATE COURT IN RENDERING A DIVISION OF PROPERTY FAILS TO ENSURE THAT ANY DIVISION OF PROPERTY IS EQUITABLE AND NOT IN THE PROCESS PLACE A PARTY IN A SIGNIFICANT NEGATIVE NET WORTH POSITION AND/OR GRANT JUDGMENT (NOT RELATIVE TO SPOUSAL SUPPORT) FOR WHICH THERE ARE NO SIGNIFICANT ASSETS OR POTENTIAL INCOME TO SATISFY SAME.

2. IS IT A DENIAL OF AN INDIVIDUAL'S DUE PROCESS RIGHT OR OTHER CONSTITUTIONAL RIGHTS FOR A TRIAL COURT IN A DIVORCE TO FIND FINANCIAL MISCONDUCT WITHOUT FINDING PROOF OF SAID ALLEGED FINANCIAL CONDUCT BY CLEAR AND CONVINCING EVIDENCE THAT INVOLVED MARITAL ASSETS AND ACTIONS THAT OCCURRED SOME FOUR YEARS BEFORE THE FINAL HEARING (AND BEFORE THE DIVORCE UNDER CONSIDERATION WAS FILED) AND WITHOUT DETERMINING A FAIRLY PRECISE AMOUNT OF ASSETS ALLEGEDLY DIVIDED.

3. IT IS A DENIAL OF AN INDIVIDUAL'S DUE PROCESS IN FINDING A PARTY TO A DIVORCE GUILTY OF FINANCIAL MISCONDUCT WITHOUT CLEAR AND CONVINCING EVIDENCE OF THE ELEMENTS COMPRISING FINANCIAL MISCONDUCT, SINCE FINANCIAL MISCONDUCT IN THE DIVORCE CONTEXT IS TANTAMOUNT TO FRAUD.

In a situation wherein an Ohio court is faced with the question of dividing property between husband and wife, there are various parameters and constraints under that should be followed in order to

properly effect an equitable distribution. While the case of (*Cherry v. Cherry*, 66 O.S. 2d 348 (1981) stands for the proposition that an equal division of property is the starting point for a property division, there can be a variance if other attendant factors come into play (as directed under O.R.C. Section 3105.17). It is clear that the trial court has some discretion in making a division of marital property to vary from the concept of an equal split of property. (*Terry v. Terry*, 99 Ohio App. 3d 228 (1994). (*Jelen v. Jelen*, 86 Ohio App 3d 199, 1993). Irrespective, in rendering a division of property, as indicated above, the discretion of the court is governed by O.R.C. Section 3105.171.

It is the contention of the Petitioner that the final award of property herein whereby Respondent was granted approximately almost all of the marital assets constituted an abuse of discretion and that there was no viable basis to depart from the equal division departure point as called for under *Cherry* (supra), particularly in view of the fact that Respondent was also awarded spousal support of $2,000.00 per month for five years, and that due process isues arise as a result.

Specifically, Petitioner (Defendant) maintains that the alleged basis wherein Respondent (Plaintiff) was granted a greater proportion

of the property was not supported by the financial misconduct approach taken by the Court and the following breakdown sets forth the net result and the trial court's order.

| A. ITEM | B. PLAINTIFF | C. PETITIONER |
|---|---|---|
| 1. Judgment against Defendant for alleged financial misconduct. | +$75,000.00 | -$75,000.00 |
| 2, Spousal Support 5 years @ $1,000.00/mo.,) | +$60,000.00 | -$60,000.00 |
| 3. Judgment against Defendant for back support | + $17,120.00 | -$17,120.00 |
| 4. Judgment against Defendant for attorney fees | + $7,000.00 | - $7,000.00 |
| 5. Judgment against Defendant for (medical bills) | + $1,208.00 | -$1,208.00 |
| 6. Plaintiff awarded income tax exemption (for minor child) -3,500.00 x 6 x 30% | + $6,000.00 | -$6,000.00 |
| 7. Judgment requiring Defendant to pay bills of marriage | $14,700.00 | -$14,700.00 |
| 8. Property awarded to Plaintiff (Plaintiff's car and other assets) | Not valued | Not valued |
| 9. Property awarded to Defendant (1988 car and personal belongings) | Not valued | Not valued |
| TOTAL | +$74,000.00 (approximately) | -$174,000.00 (approximately) |

As can be seen from the above tabulation Respondent received property valued at (including judgments and personal property) having a total valuation of approximately $74,000.00. On the other hand, Petitioner received no appreciable property (only his vehicle and whatever personal belongings) for a negative allocation of over $74,000.00 -in judgments against Petitioner, property awards for Respondent against Petitioner, and other allocations or determinations. Moreover, this spousal support was awarded at time when Petitioner was not even working. However, it is also considered to demonstrate what financial benefits Respondent received compared to Petitioner's overall perspective.

It is clear that under these circumstances that the promulgated constraints and guidelines of *Cherry v. Cherry* have been superseded - somewhat more than substantially. Petitioner maintains that such allocation of all assets to one party clearly transcends any scope of reasonable discretion and violates Petitioner's due process right and other constitutional rights. Most significantly, attention must be addressed to the fact that Petitioner had no savings, property, or assets, pension from which to pay such judgments, particularly the requirement

that Petitioner pay the $75,000.00 judgment for purported financial misconduct within thirty days of the order. Petitioner was essentially placed in a contempt position before getting out of the starting block.

As to the financial misconduct aspect, for a point of departure, it is important to view the provision of the Ohio Revised Code, Section 3105.17(E)(3) which provides as follows:

> "If a spouse has engaged in financial misconduct including but not limited to the dissipation, destruction, concealment or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with greater award of marriage property."

This latter, (as observed) section gives a trial court some authority to grant one party in a divorce a greater share of assets if the other party has concealed, dissipated, destroyed, or fraudulently disposed of assets. Petitioner maintains from a viable due process standard that the limit of such authority that is the amount found to have been so diverted and other elements of financial misconduct should be determined by some by clear and convincing evidence (that the other party did indeed divert such assets or engaged in financial

misconduct as to such amount found). Ohio Revised Code Section 3105.17(E)(3) has been interpreted by many Ohio Courts to mean that the accused party must have engaged in some type of wrongdoing. (See also *Blakemore v. Blakemore*, 5 O.S. 3d 217).

Appellant further contends that the necessity of finding wrongdoing does not mean just a determination of same, but also raises an indirect finding, as a corollary, that the wrongful conduct involves fraudulent behavior. There can be no other implication by reason of the fact that wrongdoing coupled with profit to a wrongdoer or detriment to the intended victim is tantamount to or actually equivalent to fraud. In this latter aspect "Fraud" is defined variously in *Blacks Law Dictionary* (West Pub. Co. Page 788-789), among other definitions set forth therein as:

> "It consists of some deceitful practice or willful device resorted to with intent to deprive another of his right or in some manner to do him an injustice . . ."

Clearly, fraud as above defined, is substantially equivalent to the definition of the required conduct to find such financial misconduct.

Since there is some equivalence between fraud and the required action for finding financial misconduct, the particular burden of proof required therefore must be also equivalent. Specifically, as is well known to this Court in Ohio, a clear and convincing evidence burden of proof is required for finding fraud (See *Household Finance Corporation v. Altenberg*, 5 O.S. 2d 190). Consequently financial misconduct must as a consequence, be proven by clear and convincing evidence. (Attention is directed in this respect to the specific language of O.R.C. 3105.17(E)(3) that refers in part to "fraudulent" conduct). The trial court in this case did not make such a finding of financial misconduct by clear and convincing evidence, and Petitioner contends that this issue needs to be clarified by particularity in view of the rapidly increasing numbers of cases that have financial misconduct findings in the majority of states. Penalizing a divorce litigant by making a substantially disproportional award should be consummated under a proper and uniform standard in all states and that standard should be consistent with the clear and convincing evidentiary standard.

In summary, appellant maintains there must be credible competent evidence to support the trial court's decision (and this

evidence must be clear and convincing) before utilizing the provisions of O.R.C. 3105.171(E)(e). The finder must include evidence of (a) financial misconduct, (b) that profits one party or detract from the other's share, (c) that the said property had a specific value. (a) There must be sufficient evidence of wrongful conduct (*Spychalski v. Spychalski*, (1977) 80 Ohio App. 3d 46), and this includes a fairly precise determination of the value (amount) of property subject of the alleged financial misconduct, as stated above.

As can be seen from the court's order, the court was uncertain as to the amount involved in the alleged financial misconduct. (Basically because Respondent provided rough estimates). Obviously, there was no clear and convincing evidence or competent and credible evidence as to what amount was involved and the court reflected same in its decision. Furthermore, the alleged financial misconduct allegedly occurred some four years or so (in another state) prior to hearing of the divorce herein and apparently prior to or during the pendency of a divorce filing (between the same parties) in another state. Petitioner maintains that any events that occurred four years ago in another state prior to the divorce at hand is remote and not relevant and should not

be considered as financial misconduct in the divorce context nor was there incorporation of the same.

IT IS A DENIAL OF AN INDIVIDUAL'S DUE PROCESS AND OTHER CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO AWARD SPOUSAL SUPPORT WITHOUT A DETERMINATION OF THE PRESENT INCOME OR INCOME CAPACITY OF THE PARTY AGAINST WHOM THE AWARD IS ORDERED.

In this matter, spousal support was awarded to Respondent in the amount of $2,000.00 (subsequently $1,750.00 per month) per month for the remainder of her life subject to termination upon remarriage, death etc. Petitioner sets forth the following aspects pertinent in this regard:

> (1) Respondent was working at the time prior to divorce and in good health and capable of working.
> (2) Respondent was awarded liquid assets in the total sum of over $300,000.00.
> (3) Other reasons set forth below.

It is the position of Petitioner in this case that the award of spousal support for the amount and length of time involved was not justified or within the constraint and guidelines set forth in Ohio Revised Code Section 3105.18 (which delineates the factors the Court

should consider for a spousal support award). (See *Beek v, Beek* 113 Ohio App. 3d 24).

In this regard, the Petitioner was age 40 at the time of the divorce and had prior work history earning income. The trial court did not consider projected Respondent's projected Social Security benefits, or other retirement benefits, the health condition of the Respondent that permitted her to work, the fact that Petitioner was not working, the realistic income earning level from RESPONDENT'S awarded assets or the differences in lifestyle, also the fact that petitioner was left (by the Court Decree) with less assets of the marriage than respondent received.

Moreover, and most importantly Petitioner was not working during the latter part of the divorce proceedings yet the Court imputed income to Petitioner at a level of his earnings some forty-five years prior to the divorce hearing at the time of the divorce Petitioner was not earning the same level of such imputed income (or any income), which was imputed at over $100,000.00. This was inequitable to set such a high income level both as a basis of spousal support and child support. (Interestingly, the Court of Appeals reversed and remanded

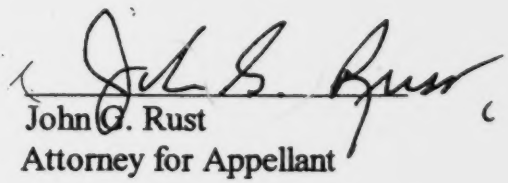
on the child support findings based upon the imputed income level , as income levels used in the child support calculation - but not as to the spousal support issue.

## EXPLANATION OF WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL ISSUE OR IS A MATTER OF GREAT PUBLIC INTEREST.

Petitioner maintains that this case involves substantial constitutional issues, one of which involves the right of the Court to deprive one of significant assets (under the financial misconduct in the domestic relations context) without clear and convincing evidence. This area of financial misconduct is being used more and more by the Courts to deprive a spouse of significant assets-all without a well delineated standard of proof which is appropriate for the circumstances--such as be a clear and convincing standard. This unfairness is a real impediment to the fairness of the divorce system and unless clarified could lead to future harm to a system that must remain fair to all parties (so that potential arbitrary awards under the financial misconduct route are fairly implemented.) Additionally, in this area of financial misconduct, there must be some determination that amount of

the financial misconduct award is founded upon and commensurate to the amount that is purportedly misappropriated. All this stems from an interest of fairness to all parties involved under due process considerations.

Yet, another consideration that must be considered in this regard is the question of awarded property in a domestic context in the form of judgments or otherwise that occur when the resultant judgments, as based on property leave one party in a substantially negative net worth position, where there is a judgment against one for an amount against a party who does not have in assets to cover the judgment. This situation leads to gross inequality that lead to serious creditability concerns.



John G. Rust
Attorney for Appellant

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**THE SUPREME COURT OF OHIO**

97-171

MAR 12 2003
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

| | | |
|---|---|---|
| CHERYL L. SYSLO, | * | Case No. 02-1976 |
| Appellee | * | |
| | | **ENTRY** |
| vs. | * | |
| JAMES L. SYSLO, | * | |
| Appellant | * | |

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by George R. Royer, Esq.
(Lucas County Court of Appeals No. L 011273)

Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO

SIXTH APPELLATE DISTRICT

LUCAS COUNTY

Cheryl L. Syslo — Court of Appeal No. L-01-1273

Appellee — Trial Court No. Dr-97-1346

v.

James L. Syslo — DECISION AND JUDGMENT ENTRY

Appellant — Decided: Sept 30 2002

Mervin S. Sharfman, for appellee.

George R. Royer, for appellant.

* * * * *

PIETRYKOWSKI, P.J.

This is an appeal from a judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, which granted plaintiff-appellee, Cheryl L. Syslo, a divorce from defendant-appellant, James L. Syslo, and addressed the issues of child custody and visitation, child support, property and debt distribution and spousal support. Appellant now challenges virtually every aspect of the trial court's order, raising the following assignment of error on appeal:

"Assignment of Error Number One"

"The court erred in its final judgment of divorce in rendering a division of property, as said division was inequitable to appellant and constituted an abuse of discretion and was therefore error.

"Assignment of Error Number Two"

"The court erred by finding appellant guilty of financial misconduct with or without finding proof of said alleged financial conduct by clear and convincing evidence including but not limited to (1) including non-marital property into the alleged assets diverted [sic] (2) not delineating clearly what the financial misconduct comprised [sic] (3) not finding specific profit to defendant, (4) not finding wrong

doing by defendant, (5) considering actions that occurred four years prior to final hearing and after prior divorce ac actions [sic] (7] not finding a precise amount of assets involved, (8) whether the conduct occurred within the context of prior divorce actions - thus being a matter of res judiata or other bar.

"Assignment of Error Number Three"

"The court erred by not finding appellee quilt of financial misconduct and/or penalizing appellee in proportion to the amount she misappropriated.

"Assignment of Error Number Four"

"The court erred in its decision and order in this case by failing to take in account all federal and state income tax implications as to appellant and appellee in this matter in its order allocating property between said parties.

"Assignment of Error Number Five"

"The court erred in granting custody of the minor child to appellee.

"Assignment of Error Number Six"

"The court erred in granting appellant (defendant) only supervised visitation and companionship rights with the minor child of the parties.

"Assignment of Error Number Seven"

"The court erred in arriving at both child and support levels and spousal support level in assigning or deterring that appellant's annual income to be $110,000.00 and conversely only determining appellee's effective income to be $20,000.00.

"Assignment of Error Number Eight

"The court erred in requiring the appellant to pay all marital debt of the parties.

"Assignment of Error Number Nine"

"The court erred in granting appellee spousal support (as well is granting as much as it did and as to the amount of time.)

"Assignment of Error Number Ten"

"The court erred by the bias demonstrated in questioning appellant and/or attacking defendant's credibility in the process.

"Assignment of Error Number Eleven

"The court erred in requiring the defendant to pay plaintiff's (appellee's) attorney fees in the amount of $7,000.00

Appelant and appellee were married on June 12, 1984 in Toledo,Ohio. One child, Grant (DOB September 30, 1985) was born issue of the marriage. During the course of the marriage, the parties lived in various locations throughout the United States due to appellant's work as a consultant to the nuclear power industry. Despite frequent moves, appellant's job required that he often travel away from home for weeks at a time, working at times 70 to 80 hours per week. As such, appellee was the primary care giver to Grant and did not work outside of the home.

In the spring of 1996, appellee left the marital home in Wilmington, North Carolina and returned to Toledo to care for her dying mother. She subsequently brought Grant to Toledo, and the parties separated n April 10, 1996. Thereafter, appellant filed for divorce n North Carolina. That case was transferred to Ohio but was ultimately dismissed. On September 11, 1997, appellee filed a complaint for divorce in the court below, seeking custody of Grant, child and spousal support, attorney fees and a reasonable division of

marital property. Appellant answered and filed a counterclaim for divorce which also sought custody of Grant, an equitable division of marital property, attorney fees and an order that appellee pay the debts of the marriage. The trial court subsequently filed orders appointing a guardian ad litem for Grant and ordering that appellant, appelle and Grant undergo psychological evaluations.

On November 7, 1997, the trial court issued a magistrate's temporary order which, in pertinent part, designated appellee as the residential parent and legal custodian of Grant; awarded appellant supervised visitation and companionship with Grant; ordered appellant to pay appellee as temporary child support $712.59 per month through wage withholding effective October 10, 1997; ordered appellant to provide health insurance coverage for Grant and maintain any existing health and life insurance policies covering appellee; ordered appellant to pay temporary spousal support of $1, 250.00 per month by wage withholding effective October 10, 1997; ordered the parties to pay their own living expenses; ordered appellant to pay certain monthly credit card bills; and ordered appellant to comply with the court's medical

schedule which required appellant to be responsible for Grant's medical insurance and medical expenses.

On June 4, 1998, the case came before the lower court for a trial on the issues of grounds for divorce, child custody and financial issues At that trial, the following evidence was presented.

Appellee testified that since Grant was born, she has been his primary caretaker and the appellant was frequently away from the marital home on business. As such, she stated, appellant as not active in Grants upbringing. Appellee sated that Grant has had emotional problems since around the age of three and has had a problem with his weight, which appellee characterized as an eating disorder. In her estimation, the frequent moves necessitated by appellant's profession were difficult on Grant and caused him to have problems adjusting. Because of Grant's problems, appellee has taken him to therapists intermittently since the problems began and has worked to keep him involved in sports programs. Appellee further testified that since she moved to Toledo in the spring of 1996, appellant has only had sporadic contact with Grant and that this has troubled Grant tremendously. With regard to child support, appellee stated that appellant has given

her very little toward Grant's support since they separated and that she has been living off of an inheritance from her mother, who died in May 1996. She further testified that although she believes appellant is presently living with a bother in Fort Launderdale, Florida, appellant never told her where he moved to after leaving North Carolina and never provided her with his address and telephone number. As such, with regard to custody and visitation, she is uncomfortable with the idea of putting Grant on a plane to visit his father when appellant has not been forthcoming as to his whereabouts. Appellee added that the contact that appellant has had with Grant has been upsetting to Grant because appellant frequently makes derogatory comments about appellee. Appellee further expressed her fear that appellant would kidnap Grant and take him out of the country. This fear was evidently based on statements that appellant made to several people indicating that he wanted to kidnap Grant. Finally, although appellee admitted occasionally smoking marijuana when she lived in North Carolina, she stated that she has not smoked any since she moved to Toledo.

With regard to the financial issues, appellee testified that, at the time of the trial, she was 40 years old, had a high school education and,

over the past 15 years, had only worked for three months at a jewelry store. Her intent was to obtain her real estate license and pursue a career as a real estate agent. Appellee stated that during the course of the marriage, appellant earned over $100,000.00 per year but that in his last job he earned about $78,000.00 per year. Despite his income, appellant was, as of June 3, 1998, $17,120.38 in arrears on his child and spousal support payments. She further stated that appellant was in arrears on other bills that he had been ordered to pay in the magistrate's order of November 6, 1997. In particular, appellee stated that appellant had failed to maintain health insurance for Grant. As a result, appellee paid $1,139.35 in medical bills for Grant.

'With regard to the parties' marital assets, appellee testified that the parties sold their marital home in the fall of 1996 and split the proceeds of that sale. Accordingly, there was no marital home or mortgage. Appellee did, however, testify that the parties had acquired significant personal property during their marriage. Nevertheless, she stated that after she left the marital home and moved to Toledo, appellant sold much of that property at garage sales without her knowledge or consent. Regarding that property, appellee prepared lists

of items sold and estimated values of those items. Appellee stated that she estimated the values by researching catalogs, antique shops and talking to antique dealers. Based on these estimates, appellee testified that appellant sold appellee's premarital property worth $3,500, Grant's property worth $ 14,049, appellee's daughter Nicole's property worth $3,320 and the parties' marital property worth $74,691. She further stated that personal property that had been gifted to her by family members and friends and valued at $11,524 was also missing.

Appellee also testified that the monthly expense for her and Grant totaled $3,500 and that because appellant has not been making his support payments, she has been living off an inheritance from her mother. When appellee's mother died, appellee inherited cash equivalents of $149,000, a home worth $60,000 and a car. Appelle stated, however, that the inheritance is nearly gone. Finally, appellee testified that as of the date of the trial, she owed $4,812 in attorney fees and that she believed those fees were fair and reasonable.

On the issue of custody, appellant testified that despite his frequent absences from home, he and Grant are very close and that he participated fully in his upbringing. He stated that when he was home,

Grant was very attached to him and that when he would leave, Grant would often scream and cry for days. Since he and appellee separated, however, appellant stated that appellee has restricted him from seeing or talking to Grant and that he has only seen Grant three times since April 1996. He then stated that he attempts to call Grant once a week but the phone goes unanswered and his messages are not returned. If granted custody, appellant testified that he would live with Grant in Fort Laudedale, Florida with his, appellant's brother until he obtained his own residence. Appellant stated that he is not presently employed but that once he does find employment, he has family in the Fort Lauderdale area that can help with baby-sitting services. He also testified that he will not take a job that requires him to travel and that he will only work Monday through Friday from 8:00 a.m. to 5:00 p.m. Appellant further stated that he was looking for any type of engineering job in the Fort Lauderdale area and that he had circulated his resume with National Technical Engineering Services, requesting a home based job that did not require travel. At the time of the hearing below, however, appellant had been unemployed since November 1997.

Appellant also testified regarding the parties' financial issues. Appellant stated that he has degrees in psychology, nuclear engineering and mechanical engineering and that the highest annual gross income he had ever received was approximately $200,000.00 Appellant further testified that he had been employed at the Fluor Daniel Corporation in Greenville, South Carolina until November 1997, when he was given the option of resigning or being fired. Appellant explained that the excessive outstanding marital debts as well as the garnishment on his wages made him unfit for duty under the federal guidelines for employees of the nuclear power industry. He therefore chose to resign. Since then, appellant's only source of income has been an $85 per month United States veterans disability check. Appellant further testified that while at Fluor Daniel, his gross salary was $68,000.00 per year but that he had numerous unreimbursed business expenses he was required to cover. Given these expenses, appellant testified that his adjusted gross income for the year 1997 was $4,082.40 and that for the year 1995 he had a loss of $20,831.91. Appellant's 1996 federal income tax return submitted into evidence below showed that appellant had gross income from Fluor Daniel of $69, 395.17. Since he left Fluor

Daniel, appellant has been living with and supported by his brother in Florida. As such, appellant testified that he gave the parties' entire 1997 federal income tax refund check of $12,764.96 and the 1997 state income tax refund check of $4,000 to his brother to repay him for money he had borrowed.

Regarding the parties' marital debt, appellant testified that after the marital home was sold and the mortgage paid, the remaining marital debt totaled approximately $70,000. Since that time, however, appellant has reduced those debts to approximately $24,412.99. Nevertheless, appellant stated that he did not have the income to keep up with the monthly support payments and pay the other debts of the marriage and, so, the support arrearage accumulated. That is, appellant testified that it was financially impossible for him to make all of the payments required of him. Appellant denied having any interest in any retirement plans.

In addition to the parties, Colleen Dooley, the guardian ad litem appointed for Grant, testified at the trial below. Dooley stated that in her investigation, she spoke with appellant, appellee and Grant, reviewed documents provided by appellant, spoke with Grant's prior

therapist, reviewed the court counselor's and psychologist's reports and spoke with the court counselor and psychologist. In addition, she reviewed a lengthy "diary" prepared by appellant concerning his relationship with appellee and the history of their marriage. Dooley initially submitted a report and recommendation in June 1997 for the previous divorce case. In that report, Dooley recommended that appellee be designated the residential parent and legal custodian and that appellant be granted supervised visitation. At the trial below, Dooley stated that when she wrote her report she was concerned that appellant would try to take Grant and flee the jurisdiction. Since that time, appellant and Grant had been evaluated by Dr. Eric Nicely, who believed that Grant was old enough to protect himself from an abduction. Nevertheless, Dooley stated that she had lingering concerns about appellant. In particular, she noted that when appellant does have contact with Grant he says negative things about appellee and claims he is homeless and has no food. These comments upset Grant and Grant believes that his father is not truthful. Appellant also sends Grant cards in which he refers to appellee as a liar. These cards are also distressing to Grant. In addition, Dooley stated that appellant's diary

demonstrates that appellant has lost his focus with respect to appellee and that he may do things to punish her. Appellant's diary includes the following statements: "Cheryl is now completely devoid of any decent human characteristics such as honesty, honor, respect for the law, trustworthiness, love, faithfulness, etc ***What is left is a psychotic, twisted, fundamentally evil individual who believes she is completely above the law and believes her ends justify her means.*** She has become a lieng [sic], cheating, drug abusing, drug dealing, thieving, murdering, adulterous whore who has zero socially redeeming traits left within her. She was an unfit wife, is an unfit mother, and is unfit to freely inhabit and wonder about this earth with other decent human beings." Accordingly, Dooley recommended that appellant's visitation begin in Toledo, and that, if that is successful, then sometime in the future Grant be allowed to travel to his father's home if appellant provides appellee with his address and telephone number.

On April 9, 2001, the trial court issued a decision and judgment entry of divorce. After granting appellee a divorce from appellant, the court granted appellee custody of Grant and awarded appellant supervised visitation to take place in Toledo. The court then ordered

appellant to pay monthly child support of $987.03. This figure was reached by imputing to appellant $110,000 in annual income and imputing to appellee $20,000 in annual income. The court further awarded appellee a lump sum judgment of $17,120.38 for the unpaid child and spousal support arrearage and ordered that that judgment was not merged in the final judgment of divorce. Next, the court ordered appellant to pay appellee $1,209.81 for medical expenses that appellee was required to pay for herself and Grant as a result of appellant's quitting his job and depriving the family of health insurance. The court further awarded appellee the income tax exemption for Grant until appellant was current on his child support obligation. The court then distributed the parties' property and debts as follows. Appellee was awarded as her separate property the cash, real estate and personality she inherited from her mother's estate. Both parties were awarded all the personal property and vehicles in his or her possession. Then, finding that appellant committed financial misconduct by giving the parties' income tax refund check of $12,764 to his brother and in selling the bulk of the parties' marital property, the court awarded appellee a distributive award of $75,000. As an additional distributive

award, the court ordered appellant to pay all of the debts of the marriage, including appellee's debts of $14,350 which, the court found, she incurred as a result of appellant's failure to pay the court ordered support. The court determined that if appellant had not quit his job, appellee would not have incurred these debts. With regard to spousal support, the court awarded appellee $1,000 per month for five years, modifiable and terminable upon the death of either party or the remarriage of appellee. Finally, the court awarded appellee $7,000 in attorney fees and found that these fees were reasonable. It is from that judgment that appellant now appeals.

We will first address the fifth and sixth assignments of error as they challenge the custody aspects of the trial court's order. Appellant asserts that the trial court erred in awarding appellee custody of Grant and awarding appellant only supervised visitation with Grant. Specifically, appellant contends that in awarding appellee custody of Grant, the court ignored uncontradicted evidence that appellee regularly smoked marijuana. Appellant also asserts that the court's concern that appellant could abscond with Grant was unsupported by the record.

R.C. 3109.04(B) requires a trial court to consider the best interest of the child in making an award of custody incident to a divorce proceeding. R.C. 3109.04(F) (1) provides that in making this determination, a court is to consider all relevant factors, including, but not limited to:

"(a) The wishes of the child's parents regarding his care;"

"* * *

"(c) The child's interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interest;

"(d) the child's adjustment to his home, school, and community;

"(e) the mental and physical health of all persons involved in the situation;

"(f) the parent more likely to honor and facilitate visitation and companionship rights approved by the court;

"(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

"* * *

"(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

A trial court is given broad discretion in custody determination matters. *Trickery v. Trickey* (1952), 158 Ohio St. 9, 14. IN reviewing a trial court's custody determination, an appellate court must uphold the decision absent an abuse of discretion. *Sayre v. Hoelzle-Sayer* (1994), 100 Ohio App. 3d 203, 210. Accordingly, absent a showing that the trial court's attitude was unreasonable, arbitrary or unconscionable, this court will affirm the trial court's custody determination. Id. Moreover, it is the trial court that must determine factual disputes and "weigh the testimony and credibility of witnesses," *Gardini v. Moyer* (1991), 61 Ohio St. 3d 479, 484, and this court will not entertain those tasks upon appellate review.

This court has thoroughly reviewed the entire record of the trial court proceedings. From our review, it is clear that the trial court considered all of the relevant factors set forth in R.C. 3109.04(F)(1) in determining the best interest of Grant and in awarding his custody to appellee. While there was evidence that appellee had used marijuana in

the past, she testified that she had not smoked it since she moved to Toledo two years before the trial below. The trial court found her testimony to be credible. In addition, appellant's failure to pay child support resulting in a substantial arrearage and the fact that he lives in Florida are both factors supporting an award of custody to appellee. Accordingly, we cannot say that the trail court erred in awarding custody of Grant to appellee and the fifth assignment of error is not well-taken.

With regard to the issue of visitation, R.C. 3109.051(A) provides that if a divorce proceeding involves a child and the court has not issued a shared parenting decree, the court shall make a just and reasonable order permitting the nonresidential parent to visit the child at the time and under the conditions that the court directs. R.C. 3109.051(D) then provides in relevant part that in determining whether to grant visitation rights to a parent, in establishing a specific visitation schedule, and in determining other visitation matters, the court shall consider all of the following factors:

"(1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity; ***

"(2) the geographical location of the residence of each parent and the distance between those residences; ***

"(3) the child's and parents' available time, including but not limited to, each parent's employment schedule, the child's school schedule, ad the child's and the parents' holiday and vacation schedule;

"(4) the age of the child;

"(5) the child's adjustment to home, school, and community;

"(6) * * *

"(7) the health and safety of the child;

" * * *

"(9) The mental and physical health of all parties;

"(10) Each parent's willingness to reschedule missed visitation and to facilitate the other parent's visitation right; ***

" * * *

"(13) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully

denied the other parent's rights to visitation in accordance with an order of the court;

"(14) Whether either parent has established a residence or is planning to establish a residence outside this state;

"(15) Any other factor in the best interest of the child."

As with other child custody matters, visitation rights and the terms of visitation are within the sound discretion of the trial court. In re *Whaley* (1993), 86 Ohio App. 3d 304, 317. Appellant assets that through its order, the court failed to include a specific visitation schedule as required by R.C 3109.051(A). We disagree. The court in its order specifically referred to the court's long distance parenting schedule. That schedule sets forth the times when the non-residential parent can visit with the child. In the present situation, however, the court ordered the visits to be supervised by Margaret Toadvin under the terms and conditions as she may direct. In reaching this decision, the court states that it considered a number of factors, including the court-appointed psychologist's determination that appellant was "clinically defensive," displaying qualities of denial and intolerance, the guardian ad litem's recommendation that visitation be supervised, the

guardian ad litem's concern that messages and cards appellant had left for Grant were highly critical of appellee and therefore distressing to Grant, and the fact that appellant was not forthcoming about his residence or housing accommodations.

Given these factors, we cannot say that the trial court erred in ordering supervised visitation. Accordingly, the sixth assignment of error is not well-taken.

We will next address appellant's seventh assignment of error which challenges the trial court's order of child support. Appellant asserts that the trial court erred in imputing to him annual income of $110,000 and, conversely, only imputing annual income of $20,000 to appellee. Based on these erroneous figures, appellant asserts that the court erred in its determination of child support.

R.C. 3113.215(1), which sets forth the calculation standards for determining child support, provides in relevant part:

1 Effective March 22, 2001, the child support guidelines are now found at R.C. Chapter 3119. The present case, however, being filed on September 11, 1997, falls under the previous statute.

a) As used in this section:

"(1) Income means either of the following:

" * * *

See original (b)

" * * *"(5) Potential income means both of the following for a parent that the court *** determines is voluntarily unemployed or voluntarily underemployed:

"(a) Imputed income that the court *** determines the parent would have earned if fully employed as determined from the parent's employment potential and probable earnings based on the parent's recent work history, the parent's occupational qualifications, and the prevailing job opportunities and salary levels in the community in which the parent resides[.]"

In construing this section of the Revised Code, the Supreme Court of Ohio has specified that: "Whether a parent is 'voluntarily underemployed' within the meaning of R.C. 3113.215(A)(5), and the amount of 'potential income' to be imputed to a child support obligor, are matters to be determined by the trial court based upon the facts and circumstances of each case. The determination will not be disturbed on

appeal absent an abuse of discretion." *Rock v. Cabral* (1993), 67 Ohio St. 3d 108, the syllabus. Nevertheless, a court's failure to consider all three factors, that is "(1) the parent's employment potential and probable earnings based on the parent's recent work history, (2) job qualifications, and (3) the prevailing job opportunities and salary levels in the community in which the parent resides," in imputing income does constitute an abuse of discretion. *Badovick v. Badovick* (1998), 128 Ohio App. 3d 18, 23.

In the present case, the trial court imputed income of $110,000 to appellant "based on his former earnings and his proximity to a similar employment." Clearly, the court never considered appellant's employment potential or the prevailing job opportunities and salary levels in the Fort Lauderdale, Florida area. Similarly, the court imputed income of $20,000 to appellee without a finding that she was voluntarily unemployed or voluntarily underemployed. In order to impute income on an individual for purposes of a child support calculation, a court must first determine that the parent is voluntarily underemployed or voluntarily unemployed. *Badovick* at 23. Accordingly, we must conclude that the trial court erred in ordering

child support based on imputed income. Accordingly the seventh assignment of error is well-taken.

In his first, second, third, fourth and eighth assignments of error, appellant challenges the trial court's division of the parties' marital property and debt, its finding that appellant was guilty of financial misconduct, its failure to find appellee guilty of financial misconduct, and its failure to consider the tax implications in its allocation of property between the parties.

The Supreme Court of Ohio has long recognized that a trial court is vested with broad discretion in fashioning its division of marital property. *Bisker v. Bisker* (1994), 69 Ohio St. 3d 608,609. R.C. 3105.171(B) and (C)(1) provide that in a divorce proceeding, all marital property is to be divided equally unless an equal division would be inequitable. If an equal division would be inequitable, that marital property is to be divided in an equitable manner. Moreover, R.C. 3105.171(E)() provides that if a spouse has engaged in financial misconduct, including but not limited to, the dissipation, destruction, concealment or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a

greater award of marital property. Finally, in making a division of marital property or a distributive award, the trail court is required to consider all nine factors listed in R.C. 3105.171(F) and make written findings of fact to support its determination. The factors the court is to consider are: (1) the duration of the marriage, (2) the assets and liabilities of the parties, (3) the desirability of awarding the marital home to the spouse with custody of the children, (4) the liquidity of the property to be distributed, (5) the economic desirability of retaining intact an asset or an interest in an asset, (6) the tax consequences of the property division, (7) the costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property, (8) any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses, and (9) any other factor that the court expressly finds to be relevant and equitable.

An appellate court, when reviewing a trial court's property division, must consider the distribution in its entirely under the totality of the circumstances and we will not reverse the trial court's judgment absent an abuse of discretion. *Jelen v. Jelen* (1993), 86 Ohio App.199, 203.

In addressing the property and debt issues, the lower court first concluded that appellant was guilty of financial misconduct by selling or disposing of the marital property, tax refunds and appellee's personal property. This conclusion is supported by the record. Appellant stated in his "diary" that he had four garage sales through which he sold the bulk of the parties' marital property. He also stated in that "diary" that from those garage sales he netted approximately $7,400. Appellant further admitted in the proceedings below that he gave his federal income tax refund check of $12,764 and his state income tax refund check of $4,000 to his brother. All of these assets were marital property of which appellant had no right to dispose. Moreover, appellant's sale of the marital property deprived appellee of substantial personal property and a distribution of marital assets. Appelle presented a list of the marital property which was missing and testified that the property totaled approximately $75,000 in value. She further stated that her own personal property worth approximately $11,524 was missing. Although the court noted in its decision that some of the values of the property seemed high, the court also noted that appellant did not dispute the values. The record supports that conclusion. Upon

review, we cannot say that the trial court erred in finding that appellant committed financial misconduct and the second assignment of error is not well-taken.

In his third assignment of error, appellant contends that the court erred not finding that appellee had committed financial misconduct by misrepresenting the values of the marital property that appellant sold. The record, however, is clear. At the proceedings below, appellant did not challenge appellee's valuations. Accordingly appellant has waived any claim of financial misconduct on the part appellee and the third assignment of error is not well-taken.

Under his fourth assignment of error, appellant assets that the trial court failed to consider the tax consequences of the property distribution as required by R.C. 3105.171(F). Pursuant to R.C. 3105.171(F)(6) a trial court is required to consider the tax consequences of a property division. A court should not, however, speculate as to potential tax consequences. *James v. James* (1995), 101 Ohio App. 3d 668, 688. "For example, if the award is such that, in effect it forces a party to dispose of an asset to meet obligations imposed by the court, the tax consequences of that transaction should

be considered." *Day v. Day* (1988), 40 Ohio App. 155, 159. Where, however, an appellant has failed to produce evidence of tax consequences in the trial court, or where nothing in the record suggests that an asset must be liquidated, tax consequences are speculative and need not be considered. See *White v. White* (Feb. 18, 1998), Summit App. No. 18275.

In the present case, appellant presented no evidence of potential tax consequences associated with the division of marital assets and any attempt by the trail court to consider the tax consequences of its division would be speculative and without evidentiary support. Because the parties essentially had no assets requiring liquidation, they would not incur any adverse tax consequences. The fourth assignment of error is therefore not well-taken.

In appellant's first and eighth assignments of error, he challenges the actual distribution of property and debt made by the trial court. Appellant assets that through its order, the trial court awarded appellee all of the assets of the marriage and ordered him to pay all of the debts of the marriage and that the award was therefore inequitable. The trail court's order, however, is clear that the only marital property

awarded to the parties was the personal property and cars that they each had in their possession. The parties had no savings, retirement accounts or real estate to distribute. Because appellant had sold the bulk of the parties' marital property, the court awarded the only marital property left to distribute. In this context, it is noteworthy that appellant realized approximately $24,169 from the garage sales and tax refunds. Although the court did award appellee a distributive award of $75,000, that award was separate and apart from the property distribution and was in essence punishment for appellant's financial misconduct in selling the marital property and cashing the tax refund checks. Such a distributive award for financial misconduct is clearly permitted under R.C. 3105.171. Moreover, the amount of the award appears to be equal to the value that appellee placed on the marital property which appellant sold. Although appellant questions these values, the credibility of witnesses and the weight to be given their testimony are issues for the trier of fact and we will not substitute our judgment for that of the trial court on that issue. *Seasons Coal Co. v. City of Cleveland* (1984), 10 Ohio St. 3d 77, 81. IN that appellant obtained approximately $24,000 in marital property through the sale of

the parties' personal property and the cashing of the tax refund checks, we cannot say that the trial court abused its discretion in granting appellee the distributive award as it did.

With regard to the parties' debts, the trial court ordered appellant to pay the remaining debts of the marriage (appellant's debts of $24,412 and appellee's debts of $14,350) as a distributive award for appellant's financial misconduct in quitting his job and becoming voluntarily unemployed. In making this decision, the court expressly found that appellee's debts of $14,350 were nearly equal to appellant's support arrearage and that appellee, in all likelihood, would not have accumulated these debts had appellant maintained his job and his support payments. The court further ordered appellant to pay medical expenses of appellee and Grant totaling $1,208 for the reason that had appellant not quit his job the parties and Grant would not have been denied medical insurance and thus would not have incurred the debt.

Viewing the property and debt distribution as a whole, we cannot find that the trail court abused its discretion making the award as it did. The first and eighth assignments of error are therefore not well-taken.

In his ninth assignment of error, appellant challenges the trial court's spousal support award. A trial court has broad discretion in determining spousal support. *Kunkle v. Kundle* (1990), 51 Ohio St. 3d 64, 67. Absent an abuse of that discretion, a reviewing court may not substitute its judgment for that of the trial court. *Holcomb v. Holcomb* (1989), 44 Ohio St. 3d 128,131. The purpose of spousal support is to provide for the financial needs of the ex-spouse. R.C. 3105.18(A); *Moell v. Moell* (1994), 98 Ohio App. 3d 748, 751. Although a court's decision to award spousal support is discretionary, trial courts are statutorily mandated to determine whether support is appropriate and reasonable and to consider the factors enumerated in R.C. 3105.18(C), which include but are not limited to: (1) the income of both parties, (2) the relative earning abilities of the parties, (3) the ages and physical, mental and emotional conditions of the parties, (4) the retirement benefits of the parties (5) the duration of the marriage (6) the standard of living the parties established during the marriage, (7) the relative education of the parties, (8) the relative assets and debts of the parties, including but not limited to any court ordered payments by the parties, (9) the time and expense necessary for the spouse who is seeking

spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training or job experience, and employment, is in fact sought, (10) the tax consequences for each party of an award of spousal support, and (11) any other factor that the court expressly finds to be relevant and equitable.

In its decision and judgment entry, the lower court awarded appellee $1,000 per month spousal support for five years but did not set forth its reasons for the award. The court did, however, note at other parts of its decision that appellant has three college degrees, that appellant has earned no less than $75,000 per year in the nuclear power industry and as much as $200,000 in one year, that appellee has always been a homemaker with few marketable skills, that appellee is capable of minimum wage employment, and that appellee inherited $149,000 from her mother. Other evidence presented at the trial below revealed that both parties are in good health, neither party has any retirement benefits, the parties were married for approximately twelve years before appellant initially filed for divorce in North Carolina, and the parties essentially have no marital assets because appellant sold them. In

addition, appellee testified that although she did inherit $149,000 from her mother, that sum is nearly depleted because appellant failed to comply with the court's interim spousal and child support orders. In light of this evidence, we cannot say that the trial court erred in its award of spousal support an the ninth assignment of error is not well-taken.

In his eleventh assignment of error, appellant assets that the trial court erred in awarding appellee attorney fees of $7,000 in light of the fact that appellant has no assets from which to pay the fees and given that appellee only asserted a claim of attorney fees of $4,800.

R.C. 3105.18(H) provides that a trial court may award reasonable attorney fees to either party during any stage of a divorce proceeding. In order to make such an award, the court must determine whether the pay or has the ability to pay the attorney fees it awards and whether either party would be prevented from fully litigating his or her rights and adequately protecting his or her interests if attorney fees were not awarded. The trial court's decision regarding attorney fees must be equitable, fair, and serve the ends of justice. *Bowen v. Bowen* (1999), 132 Ohio app. 3d 616, 642. An appellate court will only

disturb a trial court's decision as to attorney fees if the trial court abused its discretion. Id.

In its decision and judgment entry, the trial court awarded appellee $7,000 in attorney fees and found that the fees were reasonable given the duration and difficulty of the case. At the trial below, appellee asked the court to award her $4,812 in attorney fees incurred in the present case and presented her attorney's fee statement in support of that request. In awarding attorney fees, the trial court did not make a determination that appellant had the ability to pay that amount and further failed to determine whether either party would be prevented from fully litigating his or her rights or protecting his or her interests if the fees were not awarded. In addition, no evidence was presented on these factors. Accordingly, we must conclude that the court erred in awarding appellee attorney fees. The eleventh assignment of error is therefore well-taken.

Finally, in his tenth assignment of error, appellant asserts that the trial court demonstrated bias against him in questioning him from the bench and attacking his credibility. Appellant contends that the trial court's bias against him can be seen in the court's questioning of him

about his tax return and the court's statment that is was "just testing a little credibility."

Evid. R. 614(B) provides that the court "may interrogate witnesses, in an impartial manner, whether called by itself or a party." Unless there is a showing of bias, prejudice, or prodding of a witness to elecit partisan testimony, it is presumed that the trial court acted impartially in questioning a witness as to a material fact or to develop the truth. *Jenkins v. Clark* (1982), 7 Ohio App. 3d 93, 98. During the course of its examination, the court may, in the interests of justice, ask proper question of witnesses, even if these are leading questions. Id. At 97,citing *Gilhooley v. Columbus Ry. Power & Light Co.* (1918), 20 Ohio N.P. (N.S.) 545..

During the trial below, the trial court questioned appellant about several matters to which he had testified. First, the court asked appellant if he ever filed a motion in either this case or the previous case, to enforce the temporary visitation order. This was in response to appellant's assertion that appellee had denied him visitation rights. Next, the court asked appellant if he had any proof that he was forced to resign form his job at Fluor Daniel. This was in light of appellant's

testimony that he was forced to resign because he no longer was considered fit for duty. Finally, the court questioned appellant about his 1996 and 1997 federal income tax returns. On those returns appellant included in his deductible business expenses, the expenses of traveling to Toledo for court proceedings, including the money he expended on meals while in Toledo. He further deducted money expended for Grant's health insurance as an employee benefit. With regard to this deduction, the court stated: "I'm just trying to figure out - testing a little credibility here." Because appellant was reimbursed for some business expenses by Fluor Daniel, those issues were relevant to determining appellant's true annual income. Accordingly we fail to see how these questions demonstrated any bias on the part of the trial court. The tenth assignment of error is therefore not well-taken.

On consideration whereof, the court finds that substantial justice has not been done the party complaining. The judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part. This case is remanded to the trial court for a redetermination of child support consistent with this decision. The parties are ordered to pay their own costs of this appeal.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist. Loc. App.R. 4, amended 1/1/98.

Peter M. Handwork, J.

Peter M. Handwork
JUDGE

James R. Sherck, J.

James R. Sherck
JUDGE

MARK I. PIETRYKOWSKI, P.J.
CONCUR.

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JUDGE

MANDATED

SEP 30 2002

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